Role of Medical Experts in Courts Under Turkish Law

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Abstract

In the Turkish legal system, courts and prosecutors may resort to an expert in cases when the situation requires a proficient, special, or technical knowledge regarding the question at hand. In addition to experts, technical consultants may be called by judicial authorities or by the parties to a dispute.

The expert provides a written affidavit and may be summoned before the court to be heard in order to clarify his or her opinion. This opinion is not legally binding for the court and may be rejected on sufficient grounds.

As a general rule, courts are not legally obligated to resort to an expert's opinion. There are some exceptions to this rule, especially regarding medical expertise. In addition, some institutions have been designated legally as "official experts" in cases requiring professional knowledge about forensic sciences and medical malpractice. Such institutions are, inter alia, the Council of Forensic Medicine, universities, and the High Council of Health. This chapter deals with the status of medical experts in Turkish law, first by giving a concise explanation of experts in general and then by describing the issues arising from medical expertise.

Introduction

Medical expertise is a tool for evaluating medical evidence in legal disputes and criminal investigations. Such evaluation may be needed as part of an investigation regarding malpractice claims or during forensic examinations, such as an autopsy report, or a physical examination of a suspect, a victim, or a witness.

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In the Turkish legal system, medical experts are regarded as a special subgroup of experts who provide valuable information in areas requiring technical and specialized knowledge. As a general rule, experts are appointed by the courts and other judicial authorities.

This chapter deals with the general rules applicable to all experts and technical consultants in Turkish criminal and civil law and then examines particular rules and exceptions regarding medical experts in courts.

Experts in General

Overview

Under Turkish law, the opinion of an expert is regarded as a method for the evaluation of evidence [1]. According to art. 63 of the Code of Criminal Procedure (CCP) and art. 266 of the Code of Civil Procedure (CCivP), courts may resort to an expert in cases when the situation requires a proficient, special, or technical knowledge regarding the question at hand. Such knowledge includes specific scientific areas, such as physics, chemistry, mathematics, architecture, or engineering [2].

Experts cannot be appointed in matters that can be solved through the application of a general and legal knowledge that is accessible to the judge. This area of "general and legal knowledge" is defined as to encompass all information available to the judge as a result of his or her legal education, professional training, and career [2]. It has been asserted that in practice, courts do not comply with this limitation, appointing experts in legal matters as well [3].

In short, the Turkish legal system provides for two distinct areas of knowledge: if the situation at hand requires the application of "general and legal knowledge," the court must not resort to an expert's opinion, whereas the area of "special or technical knowledge" may, and generally shall, lead to the appointment of an expert.

The expert aids the court in solving an issue of proof and evidence through his or her technical knowledge [4]. This aid may present itself in three forms:

- The expert may share his or her general knowledge based on professional experience.
- The expert may provide facts requiring special knowledge.
- The expert may evaluate the facts and come to conclusions by applying scientific principles and rules [4, 5].

The status of experts in criminal procedure has been regulated under the Code of Criminal Procedure (CCP), articles 62–73. In cases where these rules are not sufficient to clarify a situation, general rules on witnesses may be applied through analogy (art. 62 CCP). As an example, experts have to be independent and unbiased [4].

The status of experts in civil procedure is defined under the Code of Civil Procedure (CCivP), articles 266–287. These articles provide a very similar system to the criminal procedure and thus will be referred to as any difference from the criminal procedure arises.

Selection and Appointment of Experts

As a civil law country, Turkey mainly adopts the inquisitorial method during criminal investigation and trial. Accordingly, the general rule is that experts are not summoned by parties but by judicial authorities that are in charge of collecting and evaluating evidence (namely, the prosecutor during the investigation phase and the court during the trial). Expert opinions are also available to private parties to the case; such experts are referred to as "technical consultants" and are subject to different rules, as will be referred below.

In criminal procedure, experts may be appointed by the investigating prosecutor during the pretrial stage and by the court during the trial. During the trial, the prosecutor, the defendant, or the plaintiff may request an expert opinion from the court; the court may also resort to an expert ex officio.

As a general rule, experts are selected from a list formed by provincial justice commissions. These lists are not exhaustive. Prosecutors and courts may select experts from a list or appoint an unlisted expert, provided that they can support this decision with sufficient grounds (art. 64/2 CCP). It should be noted that, in practice, these lists are not used regularly. In many cases, courts select unlisted experts that are suggested by defense lawyers or by the court registrar [4].

Legal entities may also be appointed as experts. In this case, the legal entity shall select real people who act as experts under its authority and shall notify the court about this decision (art. 64/4 CCP). Thus, the author of the report will be individually responsible before the court and will have to appear personally if summoned [6].

In civil procedures, experts are appointed by the court upon the request of one of the parties or ex officio (art. 266 CCivP). As to the person to be selected as the expert, the same rules on lists formed by provincial justice commissions apply (art. 268 CCivP).

While the number of people to be appointed as experts is not limited, it is necessary for the appointing authority to provide sufficient grounds when more than one expert is selected for the same case (art. 63/2 CCP, art. 267 CCivP). Mostly, these instances involve cases where the subject needs to be investigated from different technical perspectives [7]. In practice, courts tend to appoint three experts, if they decide that one expert would not be sufficient [8]. When multiple experts are called for a single case, they will act as a board and carry out their duty conjointly; however, they may also submit dissenting opinions if no consensus can be reached among them [2].

Legal Obligations Regarding Experts

Obligations of the Court

As a general rule, courts are not legally obligated to resort to an expert's opinion. There are some exceptions to this rule, especially regarding medical expertise in criminal matters. In such cases, the court cannot decide on a matter without referring the case to an expert and evaluating the expert's report [9].

In criminal law, an expert's opinion is legally required in following cases: investigation of forgery of bills (art. 73/2 CCP), investigation of the mental state of suspects or defendants (art. 74 CCP), taking of body samples and examination of the body (art. 75/3 CCP), genealogic investigations (art. 76 CCP), DNA analysis (art. 79/2 CCP), medical examination of corpses (art. 86/3 CCP), autopsies (art. 87 CCP), and cases with a suspicion of poisoning (art. 89/2 CCP) [4].

Civil law imposes similar requirements: according to art. 40 of the Turkish Civil Code (TCivC), sex reassignment operations on transsexuals may only be undertaken following a decision of a court [10]. The said decision must rely on an expert's opinion, taken from an educational research hospital, and must verify that the person fulfills all physical, psychological, and legal prerequisites of the operation [2, 11]. Physicians not complying with the legal requirements are subject to civil and criminal liability. In addition, Turkish courts do not allow for a change of the data on gender in the identification cards of persons who have undergone illegal sex reassignment surgeries [10, 11].

In addition, an expert's opinion is legally required when deciding on the ability to marry and divorce someone who is mentally ill as well as deciding on mental disability when assigning a legal guardian for a person (art. 133, 165, 409 TCivC). Several laws provide for additional similar requirements, as listed by *Deryal* in a comprehensive study [2].

As can clearly be observed, many of these cases are related to a medical activity, where the opinion of a medical expert has to be sought in order to enlighten a criminal offense or a civil law dispute. Physicians are regarded as one of the professional groups whose expertise is most valuable for legal proceedings and who are often appointed as experts by courts [2].

In addition to these cases, where the requirement arises from the law, in practice, the case law of the Court of Cassation obligates courts to refer the matter to experts in many cases, particularly regarding narcotics [4].

Some institutions have been legally defined as "official experts" in order to provide expertise in their respective areas of activity. In a case where an official expert has been designated for a specific problem, the judicial authority is legally bound to appoint it primarily, resorting to other experts only if there is a legal obstacle or if the report of the official expert fails to satisfy the appointing authority [7, 12]. Some official experts are the Council of Forensic Medicine, the High Council of Health, Police Criminal Laboratory, Narcotics Laboratory of the Gendarmerie, etc [12].

Obligations of Experts

As a general rule, experts are not legally required to accept the appointment of the court [1, 13]. Official experts, designated by law and persons appearing in provincial lists, cannot refrain from being appointed as an expert, except in cases where a ground for disqualification, or a right to refrain from testifying, is applicable. An obligation to accept the duty exists for people who have been under an official duty to operate in a technical area, or a craft, and for those who, without the knowledge required by the court, would not have been able to perform their profession or craft (art. 65 CCP, art. 270 CCivP).

People who, in spite of being obligated to accept the appointment, refrain from complying with their duty as an expert can be subject to a disciplinary incarceration for a maximum of 3 months by a criminal court (art. 60 CCP) [12].

Experts who have accepted the duty are to appear before the court when summoned and to fulfill their duty honestly [1]. The expert is given an investigation period maximum of 3 months. In exceptional cases, upon request from the expert, the appointing authority may extend the period for another maximum of 3 months. Experts who fail to deliver their report within the designated period may be removed from duty and are legally obligated to present a report to the appointing authority, explaining the actions he or she has fulfilled until such removal. They are substituted immediately (art. 66 CCP, art. 274 CCivP).

In practice, experts receive an official "warning" upon the expiration of the period and are given a new deadline. If the expert does not comply with the warning, he or she is referred to the prosecutor with a charge of omission of official duty. Reports arriving after the warning, or the deadline, are still accepted as valid [14].

It is an obligation of the expert to perform his or her duties in collaboration with the appointing authority, to inform the authority about any relevant developments on the subject, and to request any measures that would be beneficial to the case (art. 66 CCP).

In civil procedure, an appointed expert who is of the opinion that the case referred to him or her does not fall under his or her area of expertise or who needs the cooperation of another expert has to notify the court about the situation within 1 week of his appointment (art. 275 CCivP).

Another obligation of experts is to take an oath to obey the law and to fulfill their duties with due diligence, according to scientific facts, impartially and objectively (art. 64 CCP, art. 271 CCivP). Experts that appear in provincial lists take the oath before the provincial justice commission and are no longer required to renew the oath when appointed by a judicial authority for a specific case [3].

Grounds for Disqualification and Challenge of Experts

Experts are subject to the same limitations as judges, and they can be disqualified or challenged on the same grounds. In criminal law, experts are "disqualified," namely, legally barred from being appointed as an expert, or can be challenged on grounds such as the identification of reasons that give rise to a possible belief that the expert cannot deliver an unbiased opinion on the case [1]. There are other

legal grounds for disqualification arising from the CCP: public officials cannot be appointed as experts for cases concerning the institution in which they work (art. 64/3 CCP) nor for cases involving state secrets (art. 47 CCP), and physicians, midwives, and defendants are exempt from expert's duty concerning cases involving their duty of confidentiality (art. 46 CCP) [1].

Responsibility and Liability of Experts

Experts who do not comply with their duties can be subject to criminal sanctions. Article 276 TCC provides for a specific offense concerning experts: false expertise, a crime punishable with a prison sentence of 1–3 years [13]. This offense can only be committed by real "persons" that have been appointed as experts by judicial authorities that are entitled to hear witnesses under oath [15]. Any falsification of facts, assessments, depositions of "persons," or the general outcome of the report may result in the criminal liability of the expert under this offense. The *actus reus* of the offense does not require any harmful consequence nor a detectable effect on the outcome of the case. The expert has to have acted with intent (namely, with knowledge and will on the falsehood). Negligent behavior is not punishable under this offense [12, 15].

In addition, experts are considered as public officials concerning their duty as an expert and are subject to the same conditions. As a result, they can be held responsible for omission of a public duty, bribery, and other offenses that can exclusively be committed by public officials, such as disclosing secrets related to public office (art. 258 TCC) [2].

Investigation and Affidavit

Investigation of the Expert

As a general rule, experts begin their investigation as soon as they are appointed by the judicial authority. Upon being summoned by the authority, experts receive the file and relevant objects in a sealed envelope and under protocol [12].

During the investigation, the expert is limited to the particular questions asked by the appointing authority and cannot add his or her own interpretation on the matter, especially regarding the legal evaluation of acts concerned. If needed, or upon request by one of the parties, the appointing authority may provide the expert with additional consultants in order to clarify technical matters outside his or her field of expertise. In this case, the reports of the consultants are annexed to the affidavit and presented to the appointing authority (art. 66/5 CCP) [16].

In criminal procedure, the expert may never ask questions directly of the people involved in the case. If such a need arises, he or she may request the appointing authority for such questions to be posed to the respective parties and may then take into account responses provided by the authority. The appointing authority may allow the expert to directly ask questions to parties involved, provided that a prosecutor or a judge is present during the interview. One exception to this general rule involves medical experts, who can directly pose questions to the

examined person, even in the absence of the prosecutor or the defense attorney, as will be examined below (art. 66/6 CCP).

In civil cases, the expert may only resort to the information of a party upon obtaining permission by the court and only do so in the presence of both parties (art. 278 CCivP).

The Affidavit and Its Evaluation

As a general rule, the expert's opinion is submitted to the court in form of a written affidavit. The expert does not need to be present at the trial [7]. He or she may be summoned by the court if needed, ex officio or upon the request of a party (art. 68 CCP). In this case, it is the duty of the expert to obey the summons and to appear before the court. If he or she fails to do so, the summons has the same consequences as a subpoena for a witness which means that the expert may be brought by force and be held for contempt of court [1].

It must be added that this procedure is rarely applied in practice. Experts are not regularly summoned to appear before the prosecutor or the court. In most cases, they send their reports to be included in the case file which is then read at the trial [8, 17].

If an expert has been summoned to appear at a trial, he or she may be cross-examined by the judges, the prosecutor, defense attorney, and the victim's representative in order to provide additional information to clarify possible ambiguities. The victim and the defendant cannot directly ask questions to the expert: they direct the question to the presiding judge, who then may either allow or disallow the question [8]. After hearing the expert at the trial, the prosecutor, the plaintiff, the defendant, and their respective lawyers are allowed to present their own evaluation concerning the expert's opinion [1].

The Turkish criminal justice system is based on a free evaluation of evidence, based on the principle of conscientious conviction of the court (art. 217 CCP). This means that there is no hierarchy among various types of evidence. As such, the court shall not be legally bound by the opinion of an expert, including reports by official experts [8]. Since every decision of a court needs to be based on sufficient grounds, these grounds need to be provided by the court if rejecting the opinion of an expert. This is necessary in order to ensure that the decision of the court can be reevaluated by the Court of Cassation [6].

If the expert's opinion fails to come to satisfactory results or contradicts previous findings, including previous opinions presented by other experts or technical consultants, the appointing authority shall resort to another expert in order to clarify the situation. The Court of Cassation reinforces this obligation through its case law. (19.09.2005, E. 2005/3428, K. 2005/6093) [4]. Prosecutors and judges who are not entirely satisfied by an affidavit seek to a renewed attempt to appoint another expert on the same subject [8].

If the expert's opinion is not entirely unsatisfactory or contradictory but simply lacking important pieces of information that are relevant to the case, the appointing authority may also request the expert to complete his or her investigation following the requests of the authority. This additional affidavit is considered as part of the original report [8].

Special Rules Concerning Technical Consultants

In addition to the experts appointed by the prosecutor or the court, the Turkish criminal justice system also provides for technical consultants to be invoked during a trial. These consultants can be chosen by the defendant or the plaintiff in order to provide the court with findings supporting their respective cases or by the prosecutor in criminal cases (art. 67/6 CCP). The technical consultant shall provide his or her professional knowledge to be taken into account during the preparation of an expert's opinion, for the evaluation of an existing report, or for a general evaluation concerning the case at hand [16].

Special rules regarding experts cannot be applied to technical consultants by analogy. For example, they cannot cooperate with judicial authorities during the investigation, particularly involving questions directed at parties [16]. This also means that technical consultants are not bound by the same restrictions as are experts: technical consultants may provide their knowledge regarding legal issues and may come to conclusions accordingly [4, 7].

Technical consultants are generally not compensated by the court, unless their opinion leads to the clarification of the case at hand (art. 177 CCP), and they may be paid by the party resorting to such opinion.

In all other respects, technical consultants are subject to the same rules as experts. They can be heard before the court, during the trial if necessary, may be cross-examined, and must answer questions directed at them. Parties may directly invite their respective technical consultants to appear before the court (art. 178 CCP) or ask the court to invite them [1].

In such cases, the court is under a legal obligation to hear technical consultants who have been brought to trial by the defendant or the victim, according to art. 178 CCP [9, 17]. It should be noted that, in practice, courts generally reject parties' requests for a technical consultant to be heard before the trial, defining them as "expert witnesses" and deeming it unnecessary for a witness to be heard, which is contradictory to the letter of the law [2, 17].

Medical Experts

Overview

The Turkish system on medical expertise can be analyzed under two titles: forensic medicine and malpractice. Forensic medicine deals with the gathering and evaluation of pieces of medical evidence. In some cases the medical activity becomes the subject of a civil or criminal investigation, where the opinion of a medical expert may be sought to clarify a possible case of malpractice. Physicians may be appointed as medical experts in order to determine the professional standard of care and whether the defendant physician has deviated from this standard [18]. Since reports regarding the liability of a physician due to malpractice are subject to

further evaluation by the court, they need to be clear, provide sufficient grounds, and be verifiable by the parties and the court [19].

In Turkey, different entities are entitled to provide expertise for these two instances. Official experts have been designated for almost all cases involving medical expertise; however, this separation is neither clear-cut nor legally binding for the respective court.

Under Turkish law, there exist very few regulations addressing medical experts directly. Thus, they will be subject to the same rules and restrictions applicable to other experts. There are some notable differences to the general rules:

- Courts may resort to the opinion of other medical experts in addition to those officially designated. Since physicians have the professional knowledge required to solve medical issues in their areas of expertise, the court may appoint them as medical experts [20].
- In many cases involving medical expertise, the court is legally obligated to refer the case to an expert. These instances have been mentioned above (section "Obligations of the Court").
- As mentioned above (section "Investigation and Affidavit"), the method of investigation for medical experts performing a body examination is different than other experts. According to the clear wording of the law, during a body examination involving living persons, medical experts may directly ask questions of them in the absence of a prosecutor, a judge, or the defense attorney (art. 66/6 CCP). This exception allows the medical expert to interview the person to be examined in a private setting, leading to a better understanding of the case while respecting the privacy of the subject [21]. It should be noted that any statement of the subject that could be related to the case at hand would need to be mentioned in the affidavit from the medical expert.
- As noted above, problems that can be solved through the application of the legal knowledge available to the judge cannot be referred to an expert. The question about the liability of a physician in cases of malpractice is not regarded as a purely legal issue that the judge can solve under all circumstances. As such, an expert's opinion needs to be taken regarding this matter [19].

Official Experts Regarding Forensic Sciences

Council of Forensic Medicine

According to art. 1 of the Law on the Council of Forensic Medicine (LCFM), the council has been designated as an "official expert" for judicial matters. Article 2 of the same law defines the primary objective of the council as "to provide scientific and technical expert's opinions in matters related to forensic medicine referred by courts, judges and prosecutors." These matters include, but are not limited to, cases where the referral is obligatory. As such, the Council of Forensic Medicine must accept any request coming from legal authorities.

Since a case of malpractice is necessarily a tort or a crime, the Council of Forensic Medicine shall also provide expertise if such a case is referred to it by

a criminal or civil court, although the official expert legally designated for these cases is the High Council of Health. In fact, the 3rd Board of Expertise of the council is entitled to provide expertise regarding malpractice issues [22].

In addition to the General Assembly, boards and chambers of expertise are formed to operate under the council. These have their own members but may also resort to consultants' opinions from outside of the council [23, 24].

In practice, cases are referred directly to chambers according to their area of expertise: the morgue, including autopsy and analysis of organs and living tissues; the chamber of physical investigation, including ballistics; the chamber of chemical investigation, including toxicology and narcotics; the chamber of biological investigation, including genealogy and hematology; and the chamber of traffic and the chamber of surveillance [24].

In case of a rebuttal of a chamber's findings by a party or the court, which is mostly the case if these stand in contradiction to the report of another expert, the matter is referred to a Board of Expertise [21]. Boards do not correspond to the chambers on a one-on-one basis but are formed according to various types of criminal offenses and other legal areas. For instance, Board No. 1 deals with killings and Board No. 2 with assault and battery. (art. 16 LCFM).

Should the court not be satisfied with the findings of the board, the General Assembly shall decide on the matter [23]. In addition, the General Assembly shall decide when the reports of the chamber and the board contradict each other or when the board could not come to a unanimous decision [25].

Universities

In addition to the council itself, art. 31 LCFM designates universities and their departments as official experts for criminal procedure in forensic matters and in other legal cases. Under this article, it is generally understood that judicial authorities may use departments of forensic sciences that are established under medical faculties [21]. As of today, there are 61 faculties of medicine operating in Turkey [26], most of which have departments of forensic medicine [27]. As of 2008, it was established that 42 such departments were operational [27].

It should be noted that, in previous years, these departments were criticized for lacking the infrastructure necessary to allow them fulfill their duties as experts, despite the high number of academics working in departments of forensic sciences [21]. In recent decisions, the Court of Cassation regularly directs courts to request additional opinions from experts to be chosen from universities [28].

Evaluation of the Reports

Forensic reports presented by official experts are not considered as of a higher rank than are other reports and are not legally binding on courts. If a court finds sufficient reason for the rebuttal of the report, it is not only entitled but also obligated to refuse it. Even the decision of the General Assembly cannot be considered decisive in this respect [21, 25]. The internal process of an official expert, to consolidate an opinion, does not exclude the report from being subject to the evaluation of the requesting body [20].

The Court of Cassation has reversed a judgment of a civil court based on a decision of the General Assembly. In the present case about a childbirth injury, the Court of Cassation found that only one gynecologist was present at the General Assembly of the Council of Forensic Medicine and that the dissenting opinion persuasively provided grounds for rebuttal. As a result, it reversed the original judgment and referred the case to the court of first instance in order to extend the scope of the investigation, noting that it should resort to the opinions of other medicinal experts, in particular to a board of experts to be formed by the court from among scholars on gynecology (Ygt. 13. HD, 6.3.2003, E.2002/13959, K.2003/2380) [28, 29].

Main Issues Regarding Forensic Expertise

The quality of forensic reports in Turkey is an issue that has been subject to judgments of the European Court of Human Rights (ECtHR) [21]. The ECtHR ruled repeatedly on a violation of art. 3 or 13 of the convention due to the inadequacy of the medical examination that has taken place (cases of *Akyol v. Turkey, Aydın v. Turkey*) [20, 21].

Another issue concerning forensic reports is the legal requirement for medical experts to determine whether a victim has been psychologically damaged as the result of a particular offense. This requirement is included as an aggravating circumstance for some offenses, particularly the sexual harassment of children. This means that a sexual offender is to be punished with an aggravated sentence, should it be established that he or she has caused a psychological trauma to the child victim (art. 103 Criminal Code). In most cases, the child cannot be examined adequately by a skilled physician. As a result, the findings of the examination are not reliable or lead to the loss of valuable evidence [21, 30].

A similar problem arises in cases of assault and battery, where the law prescribes that "the causing of a life-threatening situation" will be considered as an aggravating circumstance. The ambiguity of the phrase leads to irregularities in practice and has been criticized on this account [21].

High Council of Health

Establishment

Another official medical expert is the High Council of Health, a board of advisors under the Ministry of Health, providing experts' opinion on criminal matters related to medicinal practices. In civil procedure there is no obligation for courts to resort to the opinion of the High Council.

The council is composed of professionals that are appointed to ensure a balanced representation of various fields of medicine, as put forward by art. 5 of the Regulatory Statute of the High Council of Health, dated 17 December 2007 (Regulatory Statute). According to this regulation, the council consists of 15 members that include the undersecretary to the Minister of Health, the First Legal Advisor of the Ministry, and the directors of Basic Health Services and Therapeutic Services as natural members of the council. The remaining eleven members are

nominated by the General Director of Health Education and appointed by the Minister of Health for a term of 1 year, which may be extended. As such, the High Council is not an autonomous body but rather an appendage of the Ministry of Health.

The High Council consists of a limited number of members, and not every area of expertise is represented in the High Council, due to such limitations [31].

According to a study, the High Council of Health met 206 times between 1931 and 1999 and submitted opinions for almost 10,000 cases. This represents 170 cases per year [32].

As the workload of the High Council increased in more recent years, commissions of expertise have been formed by the Regulatory Statute, art. 15. These commissions work under the High Council of Health, investigating individual criminal cases referred to the High Council by courts and submitting reports to the High Council. In addition, the High Council and commissions of expertise may directly resort to consultants' opinions if need arises (Regulatory Statute, arts. 15/3, 25).

The High Council of Health is legally required to meet once every year. In practice it meets for two consecutive days each month. These meetings are not considered to be sufficient, as they lead to considerable delays in the process of delivering justice.

The High Council only investigates the matter based on the file provided by the court; people are not heard or examined in order to come to a conclusion. Statements of individuals who are supposed to be related to that particular judicial case, records of health institution, patient's documents and X-ray films, laboratory tests, autopsy reports (if available), and additional expertise reports are taken into account [32]. The file sent to the High Council may be lacking in important data and information, due to incomplete records which might prevent the High Council from finding the truth [5]. It is noted that in the same cases, opinions of the Council of Forensic Medicine and of the High Council of Health differ frequently, the High Council mostly finding no malpractice, while the Council of Forensic Medicine comes to the opposite conclusion [33].

Evaluation of the Reports

Overview

Until recently, the High Council's opinion was to be sought in criminal matters that are related to medical practices, as provided by art. 75 of the Law on the Practice of Medical Sciences. The case law of the Turkish Court of Cassation was persistent on this requirement, resulting in decisions of reversal [28]. In some instances, the Court of Cassation reversed judgments of courts that referred the case to the Council of Forensic Medicine, but not to the High Council of Health (i.e., Ygt. 9. CD., 01.07.2005, E. 2005/1832, K. 2005/5611) [25, 29].

Resorting to the opinion of the High Council was sufficient for the requirement to be fulfilled. It was established that in many malpractice cases, reports were taken from additional sources, at least concerning cases of dental malpractice [34]. In other words, the content of the report was not legally binding for the court [25, 34, 35]. Although this view had been accepted by the Court of Cassation in civil cases for a long time (Ygt. 13. HD, 09.04.2002, E. 2002/1376, K. 2002/3840; Ygt. 13. HD, 09.05.2000,

E. 2000/1146, K. 2000/4438) [25, 29], the opposite opinion dominated the criminal chambers of the Court of Cassation. This case law was criticized for confusing the obligation to resort to an expert with the obligation to accept the results, even though they may be contradictory or unsatisfactory [19, 25].

In recent decisions, the Court of Cassation had changed its view, adopting the criteria set forth by the legal literature and by its civil chambers for criminal cases. In one case, the court reversed the decision of the court, requiring it to take into account not only the report of the High Council but also its dissenting opinions, to debate them in open trial, and to provide for sufficient grounds should they be refused (Ygt. 4.CD, 30.05.2007, E.2007/1624, K.2007/5160) [28]. As a result, the court would have to resort to other experts' opinions in order to clarify the matter, if the report was not satisfactory, contained discrepancies, or contradicted legal or material findings of the court.

Recent Developments

In 2010, the Turkish Constitutional Court delivered a groundbreaking judgment on the legal requirement to seek the opinion of the High Council of Health in criminal matters.

The case arose from a late delivery of an expertise report from the High Council, resulting in the case to be subject to the statute of limitations. The defendant applied to the Constitutional Court, complaining about the legal requirement to resort to the High Council resulting in a violation of his right to an expedited trial.

In its decision, the Constitutional Court noted that, in practice, courts resort to the opinion of the Council of Forensic Medicine in addition to that of the High Council of Health, resulting in longer periods of trial. The court, taking into account the time spent for the delivery of the report in the present case (3 years, 7 months, and 23 days), and considering that this delay was the result of the fact that all judicial requests have to be directed to the same council, which meets in set periods, annulled art. 75 of the Law on the Practice of Medical Sciences. The Constitutional Court also noted that courts could achieve more accurate and speedier results by resorting to the expertise of the Council of Forensic Medicine, university hospitals, or public hospitals.

The decision of the Constitutional Court did not abrogate the High Council of Health, nor did it change its statute. It merely annulled the legal requirement for courts to refer the matter to the council in criminal malpractice cases. As a result, courts are free to choose and appoint any institution or physician as an expert in such cases.

Ready Reckoner

- Under the Turkish legal system, experts are mainly selected by courts. In criminal cases, prosecutors may appoint experts in the pretrial period, until the indictment.
- Private parties may also resort to experts' opinions at their own expenses, but these are referred to as "technical consultants." Technical consultants cannot cooperate with judicial authorities.

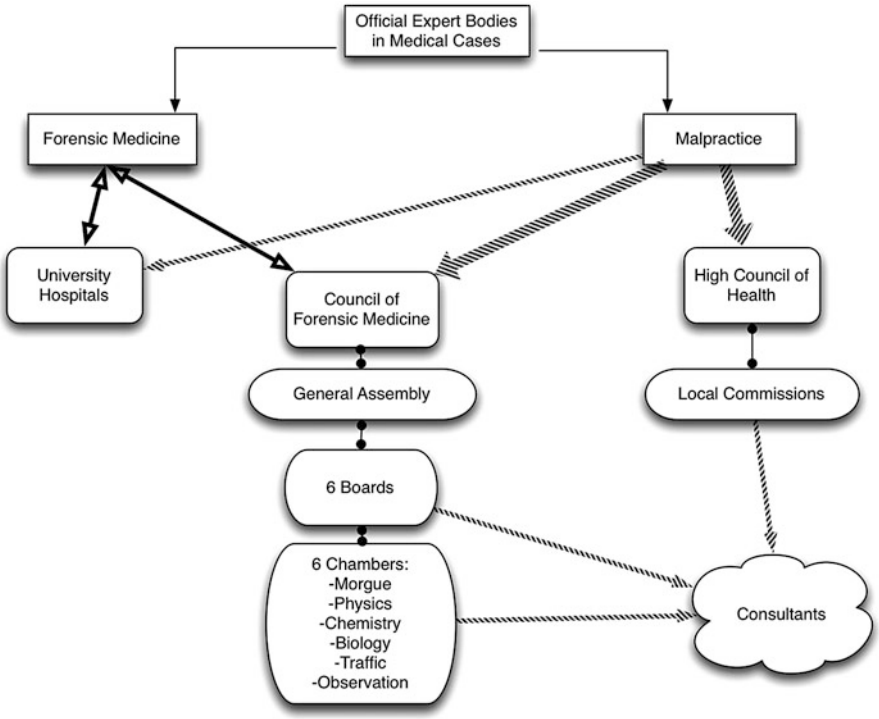

Fig. 57.1 Official expert bodies in medical cases under Turkish law (*Dotted arrows* indicate bodies or persons to which referral is not obligatory)

- Experts must be present at a hearing if they are officially summoned. In this case, they may be cross-examined by the presiding judge, the prosecutor in criminal cases, the defense lawyer, and the victim's attorney.
- As a rule, medical experts may not ask questions directly of the subjects of a case in the absence of the judge, the prosecutor, and the defense lawyer. This rule does not apply for medical experts during physical examination.
- In Turkey, medical expertise is provided primarily by "official experts" designated by law.
- Official expert bodies in the medical field are:
  - The Council of Forensic Medicine, entitled with expertise in forensic matters
  - University hospitals with forensic departments
  - The High Council of Health, entitled with expertise in malpractice cases
- Courts are not legally bound by the reports of "official experts" and may resort to other experts in order to clarify the situation.
- Following a recent decision of the Turkish Constitutional Court, courts are no longer required to resort to the expertise of the High Council of Health and may instead refer to case to other bodies.

- It can be observed that these bodies are structurally well established; however, their findings are not always satisfactory. This fact leads to a criticism on the part of the literature and directs courts to reevaluate these findings through referring the case to additional experts and prolonging the process of delivering justice (Fig. 57.1).

Cross-References

- ▶ Current Status and Legal Treatments of Medical Disputes in China
- ▶ Expert Evidence – the Decision Maker's Perspective
- ▶ Hypothetical Legal Questions and the Psychiatric Expert
- ▶ Law of Evidence: Main Principles
- ▶ Legal Medicine Report Preparation in Australia
- ▶ Legal Medicine in Turkey
- ▶ Medico Legal Organization in Portugal and Legal Medicine

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Further Reading

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